APPEAL NO. 93104

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On December 8, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The record was kept open until January 9, 1993 to allow claimant to have an MRI and to present medical evidence which was required for a complete record. The issues agreed upon at the CCH were: 1) whether claimant sustained a back injury in the course and scope of his employment on (date of injury), and 2) whether claimant reported a back injury to the employer within 30 days of (date of injury). The hearing officer determined that the appellant, (claimant herein), did not sustain a compensable injury in the course and scope of his employment on (date of injury) and that claimant, without good cause, failed to notify the employer within 30 days of the alleged injury. Claimant contends that there was insufficient evidence to support the hearing officer's decision and requests that we reverse the decision and render a decision in his favor. Respondent, (carrier herein), responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant in his appeal fails to specify any errors which he contends the hearing officer committed and only summarizes the testimony and evidence from the claimant's point of view. Consequently, we will review claimant's appeal as based on insufficiency of the evidence to support the hearing officer's findings of fact and conclusions of law.

Claimant testified through an interpreter that he was employed as a groundsman/laborer by (employer), the employer herein. Claimant testified that on Sunday, (date of injury), he arrived at work at approximately 6:00 a.m. At around 7:00 a.m. claimant said he injured his back while picking up a container or cooler of ice and water which weighted between 75 to 80 pounds. Claimant states he called for Ms B, his daughter, who was also a housekeeper for the employer, to assist him. Ms. B testified she saw claimant with the container and helped him take the coolers outside. It is not clear from the testimony and Ms. B written statements whether Ms. B actually saw claimant get hurt or just helped claimant with the coolers after he complained of the injury. Claimant then testified he found JGL, another of the employer's maintenance workers, who is also claimant's son-in-law, and asked Mr. L to accompany him to the supervisor's office to tell the supervisor he had injured his back. Claimant testified that Mr. L told Mr W, the supervisor, that claimant hurt his back. This conversation is emphatically denied by Mr. W. Claimant testified that he got an appointment and saw Dr. Y the next day, June 15th. Dr. Y gave claimant a slip dated 6-15-92 which stated "This patient will need 3 weeks of bed rest, maybe more." Mr W, the golf course superintendent and claimant's supervisor, testified that Mr. L gave him the doctor's slip on Monday, June 15th. Mr. W testified he asked Mr. L what was wrong with claimant and Mr. L replied, "M is sick and not able to work." Mr. W had his secretary

contact the doctor's office to determine the nature of claimant's illness. PT, Mr. Ws secretary, testified she called the doctor's office and that the doctor asked her if claimant's injury was a workers' compensation case and Ms. T replied "I'm not sure--not that I'm aware of." She was unable to get any information from the doctor. Ms. T and employer's auditor testified that normally on a workers' compensation case, the doctor's office would call the employer and notify them that an employee had an on-the-job injury and ask the employer to verify workers' compensation in order that the doctor could get paid. Claimant returned to work seven to ten days later and worked well into August. Claimant made no other efforts to report this injury.

MW testified that there was another employee on employer's maintenance work force who was bilingual, passed on orders and acted as a translator. Claimant's testimony was that he had sought out Mr. L to go with him to report the injury to Mr. W because Mr. L English was better than claimant's. Mr. L required the services of a translator at the CCH. When asked by the hearing officer to repeat exactly what he had told Mr. W about claimant's injury, he clearly stated that "M. . .my father-in-law. . .hurt his back lifting a cooler. . ." on June 14th. However, both in Mr. Ls testimony and transcribed statement, Mr. L confirmed on both direct and cross-examination that he had not witnessed the accident and did not find out about it until some time later (either three or four days or a week more or less depending on which version is used). When asked to reconcile his testimony that he reported that claimant hurt his back to Mr. Won June 14th, with testimony that he did not find out about the accident until several days later, he was unable to do so. On cross-examination, Mr. L appeared to say that he told Mr. W that his father-in-law was sick.

Mr. W categorically denies that anyone told him of claimant's injury on June 14th. As summarized above, Mr. L gave Mr. W the doctor's slip stating claimant needed bed rest on Monday, June 15th and that his secretary was unable to get much further information regarding claimant's absence. It is undisputed claimant came back to work around June 29th. The testimony of RC, claimant's daughter-in-law, who speaks good English, was that on August 17, 1992, she went with claimant to speak with "G" (later identified as RG, employer's general manager) about getting help in paying claimant's medical bills. Mr. G in turn asked Connie Tobin, employer's auditor and benefits administrator, about the matter. There are some contradictions about the sequence of events regarding Mr. Gs inquiry in that there is a note from Mr. G to Ms. T saying "C, need to know if this is workman comp--(RWG)." Ms. Ts testimony was that this was placed on one of claimant's time off requests on August 3rd and the note caused Ms. T to research the matter. The first notice of injury was filed by employer on (date of injury).

In addition to medical time off slips dated 6-15-92, 8-13-92, an order for an MRI dated 8-24-92, and time off slip dated 8-24-92, an undated TWCC-64 (Specific and Subsequent Medical Report) states "MRI of L-S region ordered - advised not to work." A TWCC-61 (Initial Medical Report) dated 9-15-92 states "This patient was treated as a private patient.

Continue conservative treatment until his employer notify (sic) us that this patient can be treated as workmans compensation." The history on the TWCC-61 was "It happened when lifting a 75 lbs (sic) barrel at work," and had as findings "Severe pain on Lumbo-Sacral region." The MRI that was done after the CCH with the record left open is dated 12/18/93 and states "There is evidence of disc desiccation involving multiple lumbar intervertebral discs. No definite herniated disc material can be seen affecting the thecal sac. The thecal sac is intact with no significant impression upon it. The visualized nerve roots also appear intact."

The hearing officer's discussion comments "Mr. Ls testimony is not credible. Because of its ambiguity and inconsistency it fails to establish the fact of an accident or its reporting. Mr. W's testimony was consistent and totally credible. . . ."

The 1989 Act in Article 8308-6.34(e) provides, as we have previously held, that the hearing officer is the sole judge of the relevancy and materiality of the evidence and of the weight and credibility to be given the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The claimant has the burden of proving that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty and Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). In the instant case, claimant testified that he injured his back lifting coolers filled with ice and water. As noted above, it is not clear that Ms. B actually witnessed the injury or whether she was called by her father to assist him in carrying the coolers outside. In any event, that the injured party is the only witness to an injury does not defeat a valid claim. However, even if claimant's testimony is uncontradicted, as an interested party, his testimony only raises an issue of fact for the trier of fact, in this case the hearing officer. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The trier of fact has the responsibility to judge the credibility of the claimant and the weight to be given his testimony in light of the other testimony in the record. Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). To this end the hearing officer could believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer made it clear that he did not find Mr. Lara's testimony credible. Claimant's testimony, corroborated to some extent by Ms. B, and uncontradicted, only raises an issue of fact. The fact claimant returned to work on June 29th, worked steadily at his regular job until August, without making further inquiry about his claim and without seeking the assistance of an impartial bilingual coworker who routinely translates between the supervisor and non-English speaking workers, no doubt effected the hearing officer's decision. If there is some evidence of a substantial and probative character to support the fact finder's determinations, those findings will not be disturbed even though the reviewer might have reached a different conclusion therefrom. Commercial Union Assurance Company v. Foster, 379 S.W.2d 320 (Tex. 1964). In reviewing a case, the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions

different than those the Appeals Panel deem most reasonable, even though the record contains evidence of or gives equal support to inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). If the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based on insufficiency of the evidence. Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992, citing Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242, 247 (Tex. App.-Beaumont 1991, writ denied). We find there is sufficient probative evidence to support the hearing officer's determinations.

As to the issue of notice to the employer, resolution of that issue turns on the credibility of the witnesses. Claimant concedes he never, personally, told his supervisor of his back injury. It is both claimant's testimony and Mr. Ls testimony that they went to Mr. W's office on June 14th and told him of the injury. Mr. L's testimony on this point is less than clear. Although he states he reported claimant's injury, giving clear and unambiguous language, other parts of Mr. L's testimony regarding when he first learned of the injury cast doubt on his credibility. Although this may have been due to the language barrier, there are nevertheless major contradictions in Mr. Lara's testimony. Ms. B states she knew the injury was reported, but then explains she knew this because claimant said he reported it. On the other hand, Mr. W was clear that neither claimant or Mr. L spoke with him on June 14th and that on Monday June 15th, Mr. L brought in a sick slip from the doctor stating claimant "will need 3 weeks of bed rest, maybe more." Mr. W's testimony was that Mr. L only said "(claimant) is sick and not able to work." Both Mr. W and his secretary, Ms. T, testified Mr. W asked Ms. T to follow-up with the doctor and upon doing so Ms. T was asked by the doctor if it was a workers' compensation claim. Claimant argues that "receiving the `off work slip', the inquiry from Dr. Ys office (after being initiated by a call from the employer) and the prescription of three (3) weeks bed rest. . ." somehow constituted notice of a back injury sustained in the course and scope of employment. The hearing officer could have believed claimant, Mr. L, and the inferences drawn from Dr. Y's note and question, or he could believe Mr. W, Ms. T, Ms. T and their interpretation of Dr. Ys note. The hearing officer chose to believe the latter. As stated in the discussion regarding the issue of the injury, the hearing officer has broad discretion in which version of conflicting testimony he chooses to believe. The hearing officer as the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697, (Tex. 1986). When sufficiency of the evidence is being tested on review, a case should be reversed only if the findings are so against the great weight and preponderance of the evidence to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1982, writ ref'd n.r.e.); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In summary, we find that the hearing officer's decision was not so against the great weight and preponderance of the evidence as to be unfair or unjust. Pool v. Ford Motor Co., 715 S.W.2d 692 (Tex. 1986).

The evidence being sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge